

October 7, 2002

Tracey Wilson,
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C437
Washington D.C. 20554

RE: EX PARTE MEETING REGARDING WC DOCKET NO. 02-306

Dear Ms. Wilson:

Thank you for the opportunity to provide comments on SBC Pacific Bell's application to enter California's long distance market. Our views are representative of the small- and medium-sized Internet service providers in California that compete directly with SBC Pacific Bell.

The California Public Utilities Commission ("CPUC") has been clear that SBC Pacific Bell has failed California's public interest test and that it has not granted it permission to enter the in-state long distance market. In addition, after an exhaustive, multi-year process that involved a high level of collaboration and stakeholder input, the CPUC has given SBC Pacific Bell failing marks on 2 of the required checklist items. We are concerned, in particular, with the issue of DSL resale.

We believe that widely-available, fairly priced, competitive DSL has a role to play in California's economic recovery. By any objective measure, California's competitive DSL market is unhealthy.

- SBC Pacific Bell controls 97 percent of the California DSL market. It made significant increases in market share during a time at which the resale margin for DSL was a mere \$.95 per customer, per month.
- Prices have steadily increased. In 2000, SBC Pac Bell charged \$39.95 for DSL. In 2001, it charged \$49.95. It now offers DSL service with downstream speeds of 768Kbps-1.5Mbps for \$69.95.
- DSL availability zones have decreased steadily over the years from 18,000 feet from the nearest Central Office, to 12,500 feet today. At the same time, SBC Pacific Bell has announced that it has halted Project Pronto, a promised investment in DSL infrastructure.

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In an adequately competitive market, prices would be decreasing, market share of competitors would be greater than 3 percent and availability would be increasing. We applaud the CPUC for keeping the DSL market in mind when making its decision. Our experiences mirror the CPUC's findings.

- SBC Pacific Bell does offer "itself" preferential access to marketing information, customer service, equipment and referrals that gives itself a decisive competitive advantage.
- SBC Pacific Bell, ASI and PBIS act as an integrated unit – they seamlessly work together and from the perspective of competitors and customers the units are virtually indistinguishable from each other and useful chiefly in evading legal responsibilities, including resale and reporting of customer service complaints.
- SBC Pacific Bell has put up barrier after barrier to competitors, ranging from wholesale pricing squeezes, to customer service and billing delays, to exorbitant equipment charges, making the resale of residential DSL service in California uneconomic for independent ISPs.

In media statements, SBC Pacific Bell has made it clear that it believes California's concerns are "superseded" by federal law and that "this is now in the hands of the FCC," while the CPUC has made it clear that SBC Pacific Bell has failed both the Checklist and California law.

We believe that SBC Pacific Bell must be willing to work through all the major issues with the state in a collaborative manner. In addition, we believe that state commissions do have an intimate understanding of the applicant, the local market and the various technical and economic issues surrounding checklist compliance. States also have the luxury of time, which the FCC is denied by virtue of the ninety-day statutory timeframe.

We urge the Federal Communications Commission to insist that SBC Pacific Bell comply with *each* of the 14-point Checklist Items and bring itself in compliance with California's public interest test before being allowed into the California market.

Attached, please find a list of issues we would like to discuss and a recent editorial from the *San Jose Mercury News*, which discussed SBC Pacific Bell's application. Our thanks again for your time and consideration.

Regards,

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The Mercury News

Wed, Sep. 25, 2002

Wrong number on Pacific Bell:

GIVEN ITS HISTORY AND FAILURE TO MEET ALL CONDITIONS, WHY CUT IT ANY SLACK ON ENTERING LONG-DISTANCE MARKET?

THE question before state regulators appeared to be simple: Should Pacific Bell be allowed to enter California's \$10.5 billion long distance market? Their answer was anything but simple. In fact, it was baffling. The California Public Utilities Commission voted last week to recommend that Pacific Bell be allowed to offer calls from California to other states, but barred it from carrying in-state long-distance calls. As it stands, Pacific Bell would be allowed to carry your calls from San Jose to Reno, but not from San Jose to Truckee. Go figure.

Commissioner Geoffrey Brown says the commission did the best it could given conflicts between state and federal laws. Under the Federal Telecommunications Act of 1996, local phone monopolies, such as Pacific Bell, must meet 14 conditions to prove that the market for local phone service in their area is open to competition before they are allowed to offer long distance service. The PUC found that Pacific Bell had met 12 of those requirements and was working to comply with the other two.

But Pacific Bell failed to meet three important conditions required by the state for entry in the in-state long distance business. Notably, it has failed to show it has not engaged in anti-competitive behavior, and that its entry into the long distance market would not harm competitors.

Truly competitive markets for local and long distance service should benefit California's consumers. Bills would be lower and service better. But the PUC's findings raise real questions as to whether markets are sufficiently open at this time and whether Pacific Bell's entry into long distance serves the public's interest.

Pacific Bell competitors such as AT&T and MCI offer local phone service in California. Yet Pacific Bell has a long history of putting up roadblocks to competition, making it difficult for some customers to switch providers and using its near monopoly in local service to unfair advantage.

Admittedly, Pacific Bell has fixed many of the problems with its past conduct. Additionally, the PUC has put in place regulations to resolve some of the remaining issues.

Still, given the company's history, why cut Pacific Bell any slack? The PUC should have required that Pacific Bell meet all necessary conditions before giving it the green light to petition the Federal Communications Commission for final approval.

It's now the FCC's duty to insist on Pacific Bell meeting all -- not most -- of the federal requirements. And it must tell state regulators to resolve the remaining state law issues. Anything less would merely guarantee that Pacific Bell's application will land in court.

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It's been six years since Pacific Bell first applied for entry into long distance. It's worthwhile for California to hold out a little longer for guarantees of a truly level playing field.

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Matrix of Pacific Bell Arguments and Response from California Internet Service Providers
Discussion With FCC Staff Regarding SBC Pacific Bell California Section 271 Application
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| <u>Item</u> | <u>Pacific Bell</u> | <u>Response</u> |
|------------------------------|---|---|
| Checklist 14 – Resale | <ul style="list-style-type: none"> In order to comply with the January 9, 2001 ASCENT decision, ASI has negotiated and entered into an interconnection agreement with DSL.net to offer advanced services under terms and conditions that are consistent with section 251(c). | <ul style="list-style-type: none"> California PUC gave Pacific Bell failing marks for Checklist Item #14 FCC should not allow these issues to go unresolved in the 271 proceeding ISP experience is that Pacific Bell and its affiliates effectively combine efforts to make profitable resale of DSL next to impossible for competitors <ul style="list-style-type: none"> Exorbitant connection charges/DSLAM Artificial access limitations to ISPs/ISP customers Wholesale pricing squeeze Billing disputes Unreasonable contractual requirements No clear delineation between Pacific Bell/ASI/PBIS from ISP/customer perspective – they’re co-branded, cooperative and anti-competitive Is Pacific Bell selling DSL retail? Check its web site. |

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| | | <ul style="list-style-type: none"> • Pacific Bell has a history of using its affiliates in California to evade state law/consumer complaints reporting requirements • California is a different market than other states -- leaving DSL issues unresolved will have a greater impact here than in other states • DSL market has declined significantly since 2001 – FCC must act • Comparison to Verizon provides evidence that there is a better way |
| 709.2 Overall | <ul style="list-style-type: none"> • SBC Pacific Bell has indicated that questions raised by the CPUC are moot and that the FCC should substitute its judgment for the CPUC's and find that granting SBC Pacific Bell's application is in the public. | <ul style="list-style-type: none"> • California public interest test should be respected by the FCC – we're still stinging from the energy crisis • The CPUC decision was developed through an exhaustive multi-year, with a high degree of stakeholder consultation and collaboration • The 709.2 evidence shows that it is not in the public interest to let SBC into the LD market, the 96 ACT requires that the FCC find that it is in the public interest prior to letting SBC into the LD market. |

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| | | <ul style="list-style-type: none"> We request that the encourage the parties to reach an agreement with the CPUC to resolve 709.2 and refrain from substituting its judgment for the state's judgment. |
| 709.2 (2) No Anticompetitive behavior by local exchange telephone corporation, including unfair use of subscriber contracts generated by the provision of local exchange telephone service. | <ul style="list-style-type: none"> TA96 was designed and implemented to detect and prevent such alleged behavior by BOCs. TA96 has established structural and transactional requirements, operational independence, separate books and records, audits, and nondiscrimination safeguards to prevent anticompetitive behavior. And, Pacific asserts that it complies with these safeguards. California's adopted performance measures and incentive plan will disclose, and allow competitors and the CPUC to correct any real performance problems, whether the result of anticompetitive conduct or otherwise. | <ul style="list-style-type: none"> Pacific Bell's arguments boil down to the following. <ul style="list-style-type: none"> Federal law trumps 709.2 California performance standards replace 709.2 compliance CPUC has already approved 709.2 compliance We believe that the CPUC should decide whether or not Pacific Bell is in compliance ISP experience is that Pacific Bell is engaging in anti-competitive behavior, cross-subsidizing affiliates and improperly using its position as the local exchange carrier <ul style="list-style-type: none"> Pacific Bell/ASI/PBIS work together Preferential access to equipment Preferential access to marketing information Preferential access to referrals |
| 709.2 (3) No improper cross-subsidization of interexchange telecommunications service. | <ul style="list-style-type: none"> Pacific argues that the separate affiliate safeguards of TA96's Section 272, which were designed to prevent any cross-subsidization, are more comprehensive than the provisions of Section 709.2(c)(3). | |
| 709.2 (4) No substantial possibility of harm to the competitive intrastate interexchange telecommunications markets. | <ul style="list-style-type: none"> Pacific asserts that the CPUC already resolved this issue. Pacific notes that "[c]laims of harm to competition and/or competitors are generally raised at the FCC in | |

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| | connection with its public interest analysis of section 271 applications.” | <ul style="list-style-type: none">○ Preferential access to promotions○ Discounted monthly service rates○ Ordering blackouts don't impact affiliates○ Line-sharing● SBC Pacific Bell's behavior is bad for the market<ul style="list-style-type: none">○ 97 percent control of California DSL market.○ Low DSL wholesale margins as eliminated competition○ Price increases○ Higher prices for same speed○ DSL availability zones have decreased steadily○ DSL infrastructure investments halted |
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